In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-752

JAMES RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was arrested without probable cause and that the subsequent search and seizure of his automobile were unlawful. He also contends that 21 U.S.C. 841(a)(1) is unconstitutional and that there was insufficient evidence to support his conviction of possessing hashish.

After a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of possessing hashish with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to a term of four years' imprisonment; all but six months of that sentence was suspended, however, and petitioner was placed on probation for three years. He was also fined $12,000. The court of appeals affirmed (Pet. App. 4a-5a).

On October 23, 1973, a dog trained by the Bureau of Customs to detect the presence of illicit drugs indicated that five packages addressed to petitioner that had just arrived in this country from France contained such drugs (Tr. II 7-8, 10-11, 14-15).[1] Two of the five packages were opened by customs officials and were found to contain large quantities of hashish. The packages were marked and resealed in order to effectuate a controlled delivery of them (Tr. II 23, 35-37).

On November 1, 1973, the Paris, Virginia, post office notified petitioner that the packages had arrived. Shortly thereafter, petitioner came to the post office and claimed the packages (Tr. II 50, 76-77; Tr. III 89). Petitioner placed the packages in his car, drove to his home, and took the packages into the house. Five or ten minutes later, he returned the packages to his car and drove away (Tr. II 93-94; Tr. III 89-90).

Observing that petitioner drove in a direction leading away from the post office, federal and state officers who were monitoring his movements and actions decided to arrest him (Tr. II 94; Tr. III 114, 126). Virginia State Troopers stopped petitioner's car and placed him under arrest (Tr. II 95, 125, 143; Tr. III 82, 92). Thereafter, the car and the unopened packages were seized (Tr. II 174-175; Tr. III 94). The packages were found to contain approximately 19.3 pounds of hashish (Tr. III 37-38).

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[1] "Tr. II" refers to the volume of the trial transcript that records the proceedings of March 18, 1974. "Tr. III" refers to the transcript for March 19, 1974.

After petitioner's arrest and while he was waiting to appear before the magistrate, he attempted to hide a pair of rubber gloves under a cushion of the couch he was sitting on. When asked about this, he said that he tried to hide them because he did not want to have to explain them. There was testimony to the effect that it is a common procedure to wear rubber gloves when handling hashish (Tr. II 190; Tr. III 84, 86-87).

1. Petitioner argues (Pet. 6-9) that the officers did not have probable cause to arrest him and to seize the car and the packages of hashish, because, in the absence of evidence that he had opened the packages, the officers had no reason to believe that he knew their contents. When a person accepts delivery at a post office of packages addressed to him and containing a large quantity of narcotics, we submit there is probable cause to believe that he is aware of their contents. It is unlikely that a beneficent (or malevolent) stranger would mail packages of hashish from France to an innocent recipient in Virginia. When the officers further observed petitioner bring the packages into his house, return to the car with the packages, and then drive in a direction leading away from the post office, they reasonably believed that he knew the contents of the packages and that he was committing a crime. In those circumstances, it was not unreasonable to stop the car and arrest him.[2]

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[2]The officers' controlled delivery of the packages to petitioner did not create "an 'artificial' basis for an arrest and search" (Pet. 8). It merely gave the officers an opportunity to observe whether petitioner's actions were consistent with a knowing receipt of contraband and to pursue their investigation further in order to ascertain whether other persons were implicated in the criminal activity. A controlled delivery in such circumstances is an effective and legitimate tool of law enforcement. See *United States* v. *Doe*, 472 F.2d 982 (C.A. 2), certiorari denied *sub nom. Rodriquez* v. *United States*, 411 U.S. 969; *Chapman* v. *United States*, 443 F.2d 917 (C.A. 10); *United States* v. *Beckley*, 335 F.2d 86 (C.A. 6), certiorari denied *sub nom. Stone* v. *United States*, 380 U.S. 922; *United States* v. *Davis*, 272 F.2d 149 (C.A. 7). There can be no suggestion here that the officers' interest in the hashish was merely a pretext to search petitioner's automobile for evidence of some other offense.

Petitioner contends that "it was incumbent upon the government to have obtained an arrest warrant and/or search warrant" (Pet. 7-8). We submit that the Fourth Amendment does not require a warrant for an arrest upon probable cause of a suspected felon driving an automobile on a public highway. See *Carroll* v. *United States*, 267 U.S. 132, 156-157; *Henry* v. *United States*, 361 U.S. 98, 100. A similar issue is before this Court in *United States* v. *Watson*, No. 74-538, certiorari granted, February 18, 1975,[3] but there is no need to hold this case pending the decision in *Watson*. Although the officers in the present case knew that the packages contained hashish, it was not until petitioner accepted delivery of the packages at the post office that they had clear probable cause to arrest him. The arrest took place only a matter of minutes after petitioner accepted the packages at the post office (see Tr. II 92-95, 167). Even if a warrant might in other circumstances be required for a felony arrest, it would have been impracticable in the circumstances of this case to secure an arrest warrant.

Moreover, the warrantless seizure of the car and the packages does not depend for its validity upon the lawfulness of the arrest. The officers had probable cause to believe that the packages contained contraband and that the car was being used to transport the contraband. The hashish was subject to seizure and forfeiture under 21 U.S.C. 881(f), and the car was subject to seizure and forfeiture under 49 U.S.C. 782. A warrant was not required for either of the seizures. *Chambers* v. *Maroney*, 399 U.S. 42; *Cooper* v. *California*, 386 U.S. 58.

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[3]We are sending petitioner's counsel a copy of our petition for a writ of certiorari in *Watson*.

2. Petitioner contends (Pet. 9-12) that the evidence was insufficient to support his conviction. We submit, however, that the evidence briefly summarized above was sufficient to permit the jury to find petitioner guilty beyond a reasonable doubt. That petitioner "was placed in a dilemma" (Pet. 10) as to whether he should have taken the stand after the court denied his motion for a judgment of acquittal at the close of the government's case is a natural consequence of a criminal trial and violates no constitutional rights. See *McGautha* v. *California*, 402 U.S. 183, 215-217.[4]

3. Finally, petitioner raises here, for the first time (see *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16), the constitutionality of 21 U.S.C. 841(a)(1), contending that the statute, by making "mere possession" of a controlled substance a crime, invades an area specifically left to the states. Petitioner was not, of course, convicted of "mere possession" (see 21 U.S.C. 844) but of possession with intent to distribute. In any event, Congress specifically found that "Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic" (21 U.S.C. 801(6)), because "controlled substances possessed commonly flow through interstate commerce immediately prior to such possession" (21 U.S.C. 801(3)(C)), "[l]ocal distri-

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[4] *Buono* v. *Commonwealth*, 193 S.E. 2d 798 (Sup. Ct. Va.), is of no assistance to petitioner. In the first place, whatever may be the view of the Virginia state courts concerning the necessary burden of proof, it is not binding on the federal courts. In any event, there is no conflict between the state court's decision in *Buono* and the decision in the present case. In *Buono* the defendant was arrested immediately upon accepting delivery of a package mailed to him. Here petitioner took the packages home, drove with them in a direction leading away from the post office, and attempted to hide his rubber gloves. The jury properly concluded that petitioner knew the contents of the packages.

bution and possession of controlled substances contribute to swelling the interstate traffic in such substances" (21 U.S.C. 801(4)), and "it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate" (21 U.S.C. 801(5)).

In light of those findings, the statute is a proper exercise of federal authority under the Commerce Clause. *United States* v. *Lopez*, 459 F.2d 949 (C.A. 5), certiorari denied *sub nom. Llerena* v. *United States*, 409 U.S. 878.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[5]Petitioner's contention is particularly inappropriate in this case, where his possession resulted from a shipment of the controlled substance in foreign commerce.

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